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10
11 **UNITED STATES DISTRICT COURT**
12 **NORTHERN DISTRICT OF CALIFORNIA**

13 THE GEORGE SHAHINIAN TRUST,
14 individually and on behalf of all others
15 similarly situated,

16 Plaintiff,

17 vs.

18 ROCKET FUEL INC., MONTE
19 ZWEBEN, RANDOLPH WOOTTON
20 III, RICHARD A. FRANKEL, JOHN
21 J. LEWIS, WILLIAM W. ERICSON,
22 CLARK M. KOKICH, SUSAN L.
23 BOSTROM, and RONALD E. F.
24 CODD,

25 Defendants.

26 CIVIL ACTION NO. 5:17-cv-4707

27 COMPLAINT FOR VIOLATION OF
28 THE SECURITIES EXCHANGE
ACT OF 1934

JURY TRIAL DEMANDED

1 Plaintiff The George Shahinian Trust (“Plaintiff”), by and through its
2 attorneys, alleges the following on information and belief, except as to the
3 allegations specifically pertaining to Plaintiff, which are based on personal
4 knowledge.

5 NATURE OF THE ACTION

6 1. This action stems from a proposed transaction announced on July 18,
7 2017 (the “Proposed Transaction” or “Merger”), pursuant to which Rocket Fuel Inc.
8 (“Rocket Fuel” or the “Company”) will be acquired by Sizmek Inc. (“Parent”)
9 through Sizmek’s wholly owned subsidiary, Fuel Acquisition Co. (“Merger Sub”)
10 (collectively, “Sizmek”). Sizmek is an affiliate of Vector Capital IV, L.P. and
11 Vector Capital V, L.P. (collectively, “Vector”).

12 2. On July 17, 2017, Rocket Fuel’s Board of Directors (the “Board” or the
13 “Individual Defendants”) caused the Company to enter into an agreement and plan
14 of merger (the “Merger Agreement”) with Sizmek. Pursuant to the terms of the
15 Merger Agreement, Sizmek commenced a tender offer (the “Tender Offer”) to
16 purchase all of the outstanding shares of Rocket Fuel common stock for \$2.60 per
17 share in cash (the “Offer Price”). The Tender Offer commenced on August 2, 2017
18 and is set to expire at 12:00 a.m., New York City time, at the end of August 29, 2017.

19 3. On August 2, 2017, Defendants filed a Solicitation/Recommendation
20 Statement on Form 14D-9 (the “Solicitation Statement”) with the United States
21 Securities and Exchange Commission (“SEC”) in connection with the Proposed
22 Transaction. As described herein, the Solicitation Statement omits material
23 information with respect to the Proposed Transaction, which renders it false and
24 misleading, in violation of Sections 14(d), 14(e), and 20(a) of the Securities
25 Exchange Act of 1934 (the “Exchange Act”), 15 U.S.C. §§ 78n(d), 78n(e), 78t(a),
26 and SEC Rule 14d-9, 17 C.F.R. § 240.14d-9(d) (“Rule 14d-9”).

27 4. Plaintiff seeks to enjoin Defendants from taking any steps to
28 consummate the Proposed Transaction or, in the event the Proposed Transaction is

1 consummated, to recover damages resulting from the Defendants' wrongdoing
2 described herein.

3 JURISDICTION AND VENUE

4 5. This Court has subject matter jurisdiction over all claims asserted
5 herein pursuant to Section 27 of the Exchange Act, 15 U.S.C § 78aa, and 28 U.S.C.
6 § 1331, as Plaintiff alleges violations of Sections 14(d), 14(e), and 20(a) of the
7 Exchange Act.

8 6. This Court has personal jurisdiction over all of the Defendants because
9 each is either a corporation that conducts business in, and maintains operations
10 within, this District, or is an individual who is either present in this District for
11 jurisdictional purposes or has sufficient minimum contacts with this District so as to
12 make the exercise of jurisdiction by this Court permissible under traditional notions
13 of fair play and substantial justice.

14 7. Venue is proper under 28 U.S.C. § 1391 because Rocket Fuel is
15 headquartered in this District, each Defendant transacted business in this District,
16 and a substantial portion of the transactions and wrongs complained of herein
17 occurred in this District.

18 PARTIES

19 8. Plaintiff is, and has been continuously through all times relevant hereto,
20 the owner of Rocket Fuel common stock.

21 9. Defendant Rocket Fuel is a Delaware corporation with its principal
22 executive offices located at 2000 Seaport Boulevard, Suite 400, Pacific Shores
23 Center, Redwood City, California 94063. Rocket Fuel's common stock is listed and
24 traded on The NASDAQ Stock Market under the symbol "FUEL."

25 10. Defendant Monte Zweben ("Zweben") has served as a director of
26 Rocket Fuel since 2010 and is the Chairman of the Board.

27 11. Defendant E. Randolph Wootton III ("Wootton") has served as a
28 director of Rocket Fuel since 2015 and is the Company's Chief Executive Officer

1 (“CEO”).

2 12. Defendant Richard A. Frankel (“Frankel”) has served as a director of
3 Rocket Fuel since 2008 and is the Company’s Co-Founder.

4 13. Defendant John J. Lewis (“Lewis”) has served as a director of Rocket
5 Fuel since 2016.

6 14. Defendant William W. Ericson (“Ericson”) has served as a director of
7 Rocket Fuel since 2008.

8 15. Defendant Clark M. Kokich (“Kokich”) has served as a director of
9 Rocket Fuel since 2011.

10 16. Defendant Susan L. Bostrom (“Bostrom”) has served as a director of
11 Rocket Fuel since 2013.

12 17. Defendant Ronald E. F. Codd (“Codd”) has served as a director of
13 Rocket Fuel since 2012.

14 18. Defendants Zweben, Wootton, Frankel, Lewis, Ericson, Kokich,
15 Bostrom, and Codd are collectively referred to as the “Individual Defendants.”

16 **SUBSTANTIVE ALLEGATIONS**

17 ***Background of the Company and the Proposed Transaction***

18 19. Founded in 2008, Rocket Fuel is a predictive marketing software
19 company that uses artificial intelligence to empower agencies and marketers to
20 anticipate people’s need for products and services.

21 20. On May 9, 2017, the Company issued a press release announcing its
22 financial results for the first quarter of 2017, which ended on March 31, 2017. The
23 Company touted “strong growth in platform solutions year over year,” as revenue
24 from platform solutions “grew significantly,” from 16% of total revenue the first
25 quarter of 2016, to 29% of total revenue in first quarter of 2017.

26 21. Spend growth in platform solutions grew by “a record” amount, of 70%
27 year over year. According to Defendant Wootton, the growth in Rocket Fuel’s
28 platform business was “evidence of the progress we are making transitioning Rocket

1 Fuel towards a platform-oriented software model.” The Company was also
2 “encouraged by the growth in both adoption, and spend, from our platform services
3 business.”

4 22. Rocket Fuel’s Chief Financial Officer (“CFO”), Stephen Snyder, added
5 that the Company’s “sharp focus on expenses and operational efficiency enabled us
6 to deliver first quarter adjusted EBITDA results that were at the high end of our
7 guidance range,” and that the Company believed it was “making the right long-term
8 decisions that will position Rocket Fuel for profitable growth over time.”

9 23. Notwithstanding the positive results and economic outlook for the
10 Company discussed above, the Board agreed to sell Rocket Fuel to Sizmek at an
11 inadequate price and under terms that benefit Sizmek at the expense of the Company,
12 its shareholders, and other potential bidders.

13 24. For example, the Offer Price of \$2.60 per share of Rocket Fuel common
14 stock is 3.3% below the closing price of the common stock the day before the
15 Proposed Transaction was announced, of \$2.69 per share; 53.8% below the common
16 stock’s 52-week high, of \$5.60 per share; and 9.4% below the common stock’s 52-
17 week average, of \$2.87 per share. Moreover, on the day of the Merger
18 announcement, Wall Street analysts had a median target price of \$3.25 per share, or
19 more than 25% higher than the Offer Price.

20 25. The likelihood of a competing bidder emerging to purchase the
21 Company at a higher price is significantly handicapped because the Board agreed to
22 include in the Merger Agreement certain deal protection devices that will prevent
23 alternative acquirors from submitting higher offers for the Company. These include
24 a “No Solicitation” clause, “Fiduciary Out” and “Matching Rights,” which, as the
25 Solicitation Statement explains, place a “restriction[] on [Rocket Fuel’s] ability to
26 solicit acquisition proposals from third parties and to provide information to, and
27 enter into discussions or negotiations with, third parties regarding alternative
28 acquisition proposals.” Although there is a limited “go-shop” period, it expires in

1 30 days, after which the Board cannot solicit alternative proposals. The Board also
2 agreed to a termination fee of \$4.1 million, which is payable by Rocket Fuel to
3 Sizmek in the event that the Individual Defendants decide to terminate the Merger
4 Agreement, including in order to accept an alternative proposal that exceeds that of
5 Sizmek's.

6 26. Notwithstanding the inadequate Offer Price and the deal protection
7 devices, the Merger's consummation is virtually assured because the success of the
8 Tender Offer is conditioned on Sizmek receiving the tender of a bare majority of the
9 outstanding shares, 24% of which are already locked up pursuant to tender and
10 support agreements executed between Sizmek and two significant Rocket Fuel
11 shareholders that are controlled by or affiliated with Defendants Ericson and
12 Frankel. In addition, all of Rocket Fuel's executive officers and directors currently
13 intend to tender their Rocket Fuel shares, collectively representing an additional
14 2.4% of the total outstanding shares.

15 27. Furthermore, by agreeing to the Proposed Transaction, Rocket Fuel's
16 executive officers, directors, and management secured for themselves lucrative
17 payouts that the Solicitation Statement (at page 8) describes as "interests . . . that are
18 different from, or in addition to, the interests of other Rocket Fuel stockholders" and
19 that "may create potential conflicts of interest." Indeed, if the Merger is
20 consummated, the Company's directors and executive officers stand to receive a
21 staggering \$35.6 million, or nearly 30% of the total deal value (comprised of the
22 value of their shares of common stock owned and vested options; the value of
23 accelerated unvested options and restricted stock units; and severance payments or
24 golden parachutes).

25 28. Further potential conflicts have been created with respect to Rocket
26 Fuel's Senior Vice President and Managing Director of the International Division,
27 David Gosen, its Senior Vice President of Engineering, Richard Pittenger, and its
28 CFO, Steven Snyder. As the Solicitation Statement (at page 18) provides, "[a]s

1 recognition for their continued contributions and leadership at Rocket Fuel,” Gosen
 2 and Pittenger are eligible to receive “incremental incentive bonus[es]” that are “in
 3 addition to the[ir] corporate bonus[es],” in the amounts of £80,715 and \$150,000,
 4 respectively, and Snyder is eligible to receive a retention bonus in the amount of
 5 \$81,250.

6 ***The Solicitation Statement’s Material Misrepresentations/Omissions***

7 29. Although the Solicitation Statement provides Rocket Fuel’s
 8 stockholders with an overview of the Proposed Transaction, it omits certain critical
 9 information, which renders portions of the Solicitation Statement materially
 10 incomplete and/or misleading, in violation of the Securities Act provisions discussed
 11 herein. As a result, Rocket Fuel’s stockholders lack material information necessary
 12 to allow them to make an informed decision concerning whether to tender their
 13 shares.

14 30. The “Opinion of Needham & Company, LLC” section of the
 15 Solicitation Statement (at pages 46-55) is materially deficient because it fails provide
 16 Rocket Fuel’s stockholders with a fair summary of the substantive work performed
 17 by Needham in conducting its valuation analyses supporting its fairness opinion.
 18 The financial advisor’s opinion of financial fairness for a proposed transaction is one
 19 of the most important process-based underpinnings of a board’s recommendation of
 20 a transaction to its stockholders. Thus, it is imperative for stockholders to be able to
 21 understand what factors might influence the financial advisor’s analytical efforts.

22 31. In particular, the Solicitation Statement is materially incomplete in that
 23 it fails to disclose, inter alia: (i) the trading multiples Needham observed for each of
 24 the selected companies included in its Selected Companies Analysis (pages 49-50),
 25 and the low and high trading multiples for the group of Selected Legacy Advertising
 26 Companies and the group of Selected Platform Technology Companies; (ii) the
 27 transaction multiples Needham observed for each transaction included in its Selected
 28 Transaction Analysis (page 51); and (iii) the list of transactions Needham evaluated,

1 and the premiums paid that Needham observed for each such transaction, in its
2 Premiums Paid Analysis (pages 53-54).

3 32. With respect to Needham's Discounted Cash Flow Analyses (page 52),
4 the Solicitation Statement fails to disclose: (i) the inputs and assumptions underlying
5 Needham's calculation of the discount rate range of 17%-27%; (ii) the resulting
6 terminal values Needham calculated based upon its revenue multiple valuation and
7 adjusted EBITDA multiple valuation; (iii) the cash and debt figures that Needham
8 used to calculate the ranges of illustrative implied present equity values; and (iv)
9 whether Needham incorporated Rocket Fuel's approximate \$402 million in net
10 operating losses ("NOLs") into this analysis.

11 33. With respect to Needham's Present Value of the Illustrative Projected
12 Stock Prices Analyses (pages 52-53), the Solicitation Statement fails to disclose: (i)
13 the inputs and assumptions underlying the calculation of the discount rate of 22.8%;
14 (ii) the inputs and assumptions underlying the selection of the illustrative multiples
15 for the revenue multiple case; (iii) the inputs and assumptions underlying the
16 selection of the illustrative multiples for the adjusted EBITDA multiple case; and
17 (iv) the net cash values at the end of the respective calendar years 2018-2020 used
18 in the analysis.

19 34. The foregoing information is material to Rocket Fuel shareholders in
20 deciding whether to tender their shares, as the real informative value of the banker's
21 work is not in its bottom-line conclusion, but in the valuation analysis that buttresses
22 that result. When a banker's endorsement of the fairness of a transaction is touted
23 to shareholders, the valuation methods used to arrive at that opinion as well as the
24 key inputs and range of ultimate values generated by those analyses must also be
25 fairly disclosed.

26 35. The Solicitation Statement also fails to disclose material information
27 regarding potential conflicts of interest among Rocket Fuel's Board and
28 management, including, inter alia: (i) whether Sizmek or Vector discussed potential

1 future employment or other retention terms with Rocket Fuel's executive officers,
2 directors, or management (although the Solicitation Statement says that the two sides
3 have not "reached an understanding" or "entered into any definitive agreements or
4 arrangements" concerning the foregoing, it does not rule it out and does not state
5 that no discussions have taken place or promises have been made, particularly in the
6 case of Vector, which is a private equity firm that would be inclined to retain
7 management of companies it has acquired); and (ii) any information with respect to
8 the negotiation of the incremental incentive and retention bonuses that the Company
9 has agreed to pay Gosen, Pittenger, and Snyder.

10 36. Communications regarding post-transaction employment and Merger
11 related benefits during the negotiation of the underlying transaction must be
12 disclosed to stockholders that are trying to understand the motivations that could
13 potentially influence or prevent fiduciaries from acting solely in the best interests of
14 the Company.

15 **CLASS ACTION ALLEGATIONS**

16 37. Plaintiff brings this action as a class action pursuant to Fed. R. Civ. P.
17 23 on behalf of itself and the other public stockholders of Rocket Fuel (the "Class").
18 Excluded from the Class are Defendants herein and any person, firm, trust,
19 corporation, or other entity related to or affiliated with any of the Defendants.

20 38. This action is properly maintainable as a class action for the following
21 reasons:

22 39. The Class is so numerous that joinder of all members is impracticable.
23 As of July 31, 2017, there were 46,993,632 shares of Rocket Fuel common stock
24 outstanding, held by hundreds, if not thousands, of individuals and entities scattered
25 throughout the country.

26 40. Questions of law and fact are common to the Class, including, among
27 others: (i) whether Defendants have violated Sections 14(d), 14(e), and 20(a) of the
28 Exchange Act in connection with the Proposed Transaction; and (ii) whether

1 Plaintiff and the Class would be irreparably harmed if the Proposed Transaction is
 2 consummated as currently contemplated and pursuant to the Solicitation Statement
 3 as currently composed.

4 41. Plaintiff is an adequate representative of the Class, has retained
 5 competent counsel experienced in litigation of this nature, and will fairly and
 6 adequately protect the interests of the Class;

7 42. Plaintiff's claims are typical of the claims of the other members of the
 8 Class and Plaintiff does not have any interests adverse to the Class;

9 43. The prosecution of separate actions by individual members of the Class
 10 would create a risk of inconsistent or varying adjudications with respect to individual
 11 members of the Class which would establish incompatible standards of conduct for
 12 the party opposing the Class.

13 44. A class action is superior to other available methods for fairly and
 14 efficiently adjudicating this controversy;

15 45. Defendants have acted, or refused to act, on grounds generally
 16 applicable to the Class as a whole, and are causing injury to the entire Class.
 17 Therefore, preliminary and final injunctive relief on behalf of the Class as a whole
 18 is entirely appropriate.

19 CAUSES OF ACTION

20 COUNT I

21 **Claim for Violation of Section 14(d) of the Exchange Act and SEC Rule 14d-9** 22 **(Against All Defendants)**

23 46. Plaintiff realleges each of the allegations Plaintiff incorporates each and
 every allegation set forth above as if fully set forth herein.

24 47. Defendants have caused the Solicitation Statement to be issued with the
 25 intention of soliciting shareholder support of the Proposed Transaction.

26 48. Section 14(d)(4) of the Exchange Act and SEC Rule 14d-9 promulgated
 27 thereunder require full and complete disclosure in connection with tender offers.
 28 Specifically, Section 14(d)(4) provides that:

1 49. Any solicitation or recommendation to the holders of such a security to
2 accept or reject a tender offer or request or invitation for tenders shall be made in
3 accordance with such rules and regulations as the Commission may prescribe as
4 necessary or appropriate in the public interest or for the protection of investors.

5 50. SEC Rule 14d-9(d), which was adopted to implement Section 14(d)(4)
6 of the Exchange Act, provides that:

7 51. Information required in solicitation or recommendation. Any
8 solicitation or recommendation to holders of a class of securities referred to in
9 section 14(d)(1) of the Act with respect to a tender offer for such securities shall
10 include the name of the person making such solicitation or recommendation and the
11 information required by Items 1 through 8 of Schedule 14D-9 (§ 240.14d-101) or a
12 fair and adequate summary thereof.

13 52. In accordance with Rule 14d-9, Item 8 of a Schedule 14D-9 requires a
14 Company's directors to:

15 53. Furnish such additional information, if any, as may be necessary to
16 make the required statements, in light of the circumstances under which they are
17 made, not materially misleading.

18 54. The Solicitation Statement violates Section 14(d)(4) and Rule 14d-9
19 because it omits the material facts set forth above, which renders the Solicitation
20 Statement false and/or misleading.

21 55. Defendants knowingly or with deliberate recklessness omitted the
22 material information set forth above, causing the statements in the Solicitation
23 Statement to be materially incomplete and/or misleading.

24 56. The omissions and incomplete and misleading statements in the
25 Solicitation Statement are material in that a reasonable shareholder would consider
26 them important in deciding whether to tender their shares. In addition, a reasonable
27 investor would view such information as altering the "total mix" of information
28 made available to shareholders.

57. As a direct and proximate result of Defendants' unlawful course of conduct in violation of Section 14(d) of the Exchange Act and SEC Rule 14d-9, absent injunctive relief from the Court, Plaintiff and the other members of the Class have sustained and will continue to sustain irreparable injury by being denied the opportunity to make an informed decision as to whether to tender their shares.

58. Plaintiff and the Class have no adequate remedy at law.

COUNT II
Claim for Violation of Section 14(e) of the Exchange Act
(Against All Defendants)

59. Plaintiff incorporates each and every allegation set forth above as if fully set forth herein.

60. Section 14(e) of the Exchange Act provides that it is unlawful "for any person to make any untrue statement of a material fact or omit to state any material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading..." 15 U.S.C. §78n(e).

61. Defendants prepared, reviewed, filed and disseminated the false and misleading Solicitation Statement to Rocket Fuel's shareholders.

62. In doing so, Defendants knew or recklessly disregarded that the Solicitation Statement failed to disclose material facts necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading.

63. The omissions and incomplete and misleading statements in the Solicitation Statement are material in that a reasonable shareholder would consider them important in deciding whether to tender their shares. In addition, a reasonable investor would view such information as altering the "total mix" of information made available to shareholders.

64. By virtue of their positions within the Company and/or roles in the process and in the preparation of the Solicitation Statement, Defendants were undoubtedly aware of this information and had previously reviewed it, including

1 participating in the Merger negotiation and sales process and reviewing Needham's
2 complete financial analyses purportedly summarized in the Solicitation Statement.

3 65. Defendants also knew that Plaintiff and the other members of the Class
4 would rely upon the Solicitation Statement in determining whether to tender his
5 shares.

6 66. As a direct and proximate result of Defendants' unlawful course of
7 conduct in violation of Section 14(e) of the Exchange Act, absent injunctive relief
8 from the Court, Plaintiff and the other members of the Class have sustained and will
9 continue to sustain irreparable injury by being denied the opportunity to make an
10 informed decision as to whether to tender their shares.

11 67. Plaintiff and the Class have no adequate remedy at law.

12 **COUNT III**
13 **Claim for Violation of Section 20(a) of the Exchange Act**
14 **(Against the Individual Defendants)**

15 68. Plaintiff incorporates each and every allegation set forth above as if
16 fully set forth herein.

17 69. The Individual Defendants acted as controlling persons of Rocket Fuel
18 within the meaning of Section 20(a) of the Exchange Act as alleged herein. By virtue
19 of their positions as officers and/or directors of Rocket Fuel, and participation in
20 and/or awareness of the Company's operations and/or intimate knowledge of the
21 false statements contained in the Solicitation Statement filed with the SEC, they had
22 the power to influence and control and did influence and control, directly or
23 indirectly, the decision making of the Company, including the content and
24 dissemination of the various statements which Plaintiff contends are false and
25 misleading.

26 70. Each of the Individual Defendants were provided with or had unlimited
27 access to copies of the Solicitation Statement and other statements alleged by
28 Plaintiff to be misleading prior to and/or shortly after these statements were issued
and had the ability to prevent the issuance of the statements or cause the statements

1 to be corrected.

2 71. In particular, each of the Individual Defendants had direct and
3 supervisory involvement in the day-to-day operations of the Company, and,
4 therefore, is presumed to have had the power to control or influence the particular
5 transactions giving rise to the securities violations alleged herein, and exercised the
6 same. The Solicitation Statement contains the unanimous recommendation of each
7 of the Individual Defendants to approve the Proposed Transaction. They were thus
8 directly connected with and involved in the making of the Solicitation Statement.

9 72. By virtue of the foregoing, the Individual Defendants have violated
10 Section 20(a) of the Exchange Act.

11 73. As set forth above, the Individual Defendants had the ability to exercise
12 control over and did control a person or persons who have each violated Sections
13 14(d) and 14(e) of the Exchange Act, and Rule 14d-9, by their acts and omissions as
14 alleged herein. By virtue of their positions as controlling persons, the Individual
15 Defendants are liable pursuant to Section 20(a) of the Exchange Act.

16 74. As a direct and proximate result of Individual Defendants' conduct,
17 Plaintiff will be irreparably harmed.

18 75. Plaintiff and the Class have no adequate remedy at law.

19 **PRAYER FOR RELIEF**

20 WHEREFORE, Plaintiff prays for judgment and relief as follows:

21 A. Ordering that this action may be maintained as a class action and
22 certifying Plaintiff as the Class representative and Plaintiff's counsel as Class
23 counsel;

24 B. Preliminarily and permanently enjoining Defendants and all persons
25 acting in concert with them from proceeding with, consummating, or closing
26 the Tender Offer and/or Proposed Transaction;

27 C. In the event Defendants consummate the Proposed Transaction,
28 rescinding it and setting it aside or awarding rescissory damages to Plaintiff

1 and the Class;

2 D. Directing Defendants to account to Plaintiff and the Class for their
3 damages sustained because of the wrongs complained of herein;

4 E. Awarding Plaintiff the costs of this action, including reasonable
5 allowance for Plaintiff's attorneys' and experts' fees; and

6 F. Granting such other and further relief as this Court may deem just and
7 proper.

8 **JURY DEMAND**

9 Plaintiff demands a trial by jury.

10 DATED: August 14, 2017.

Respectfully submitted,

11 /s/ David E. Bower

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